IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-24

SALVADORE GUZMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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Petitioner, Salvadore Guzman, prays that a Writ of Certiorari issue to review the order and judgment of the U. S. Court of Appeals, 7th Circuit, affirming the Petitioner's conviction rendered in these proceedings on June 6, 1979.

OPINION BELOW

The Court of Appeals affirmed the Petitioner's conviction and denial of his motion for a new trial, pursuant to order and without written published opinion on June 6, 1979. The order of the Court of Appeals appears at Appendix "A".

JURISDICTION

The order of the Circuit Court of Appeals was entered June 6, 1979. This Petition for Certiorari was filed less than thirty (30) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1254(1).

QUESTIONS PRESENTED

The Petitioner was tried and convicted after a jury trial of conspiracy to distribute and distribution of narcotics. During the trial the evidence against petitioner was solely circumstantial except for the out of court declarations of an alleged co-conspirator implicating Petitioner. The circumstantial evidence presented consisted of Petitioner being present prior to and after alleged heroin transactions in the company of the actual seller and meetings between petitioner and the seller contemporaneously with the sales to the agent. Petitioner never participated in any actual sales. Subsequent to trial and conviction it was discovered that other meetings and dealings between the actual seller and the agent were suppressed and not disclosed to Petitioner. This evidence contradicted and refuted the goverments theory that Petitioner was the source of heroin for the seller. The questions thereby arising are:

1. Whether the Petitioner was deprived of due process of law and his right to confront and cross examine his accusers when the government was allowed to admit the out of court declarations of the seller implicating the Petitioner as the source of the heroin, where the seller did not testify at trial and was not available for cross-examination.
2. Whether Petitioner was denied equal protection of the laws under the 5th Amendment due process clause by the application by the court of an improper standard of proof in allowing such testimony into evidence and

by the ambiguity which exists between the various circuits in their interpretation of the governments burden of proof with regard to the admissibility of co-conspirators out of court statements and the application of Rule 801(d)(2)(e) 28 U. S. C. A. Federal Rules of Evidence.

3. Whether Petitioner's constitutional right to a fair trial and due process of law were violated in light of the government's suppression of favorable evidence indicating additional narcotic meetings and transactions between the seller and agent-buyer at which Petitioner was neither present or in any way connected considering the government's circumstantial case against Petitioner to the effect that his repeated presence and contact with the seller indicated Petitioner was the source.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

Constitution of the United States—Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with witnesses against him . . ."

STATEMENT OF FACTS

The Appellant was charged, along with Nelson Perez and Jack Quiroga, in a multi-count indictment with conspiring to distribute quantities of heroin and with overt acts in furtherance thereof according to the allegations contained in Counts 2 through 6 of the indictment. The Appellant was named only in Counts 4, 5, and 6 of the enumerated overt acts and specific choate offenses of delivery of heroin contained therein. In essence, the charges involved three separate deliveries allegedly

occurring on September 9, 1976, November 22, 1976, and November 23, 1976 and an overall conspiracy between the named Defendants to generally distribute heroin.

Appellant was found guilty on November 18, 1977, after a jury trial on Counts 1, 4, 5, and 6 (all the Counts in which he was named) and sentenced to six years in the custody of the Attorney General with a special three-year parole term thereafter, all sentences to run concurrently. No issue is raised on the indictment. The Government's theory of the case was that Appellant, although not directly participating in any of the actual deliveries was the source of the heroin and sought to prove this theory solely through circumstantial evidence and declarations of an alleged co-conspirator. No direct evidence was presented linking Appellant to possession of any controlled substances, deliveries thereof, direct conversations with any Government witnesses, admissions or confessions. The circumstantial evidence presented by the Government is as follows:

Agent Andrew Abbott was the main Government witness. He testified that he was a Chicago Police Officer assigned to the D. E. A. working in an undercover capacity (Rec. p. 23). On September 7, 1976 he met with an informant named John Harty who told him he could set up heroin buys through one Nelson Perez (Rec. p. 24). On September 7, 1976, Abbott, using the name Abate, along with Harty proceeded to Nelson Perez' (a co-defendant herein) apartment at 1323 West 18th Place, all under the surveillance of fellow D. E. A. agents (Rec. pp. 25-113-144). Upon arrival, Abbott met Perez out in front and was introduced by Harty as the person interested in buying heroin (Rec. p. 26). They then proceeded up to Perez' apartment to discuss the matter.

At this point, Perez told Abbott his friend "Jack" would be arriving shortly and that "he (Jack) had a real nice business going and would be able to take care of as much heroin as I (Abbott) would want". (Rec. p. 27). At about 7:00 p.m. Jack Quiroga (the third co-defendant herein) arrived at Perez' apartment and was introduced to Abbott as the person who would be able to supply the heroin (Rec. p. 27). The Petitioner is not at this meeting and never seen in the presence of Perez. No evidence is submitted, direct or circumstantial, in any way linking Perez to Guzman or even inferring they knew of each other's existence. Perez never mentions Guzman in any manner or connotation.

Abbott and Quiroga then commenced a discussion of heroin purchase and Quiroga told Abbott that *"he* (Quiroga) had a real nice business going", that he (Quiroga) was certain he could supply as much heroin as he (Abbott) wanted" (Rec. p. 27). Abbott asked Quiroga for two ounces and Quiroga responded that would be no probem, he would have it whenever Abbott wanted it (Rec. p. 28). However, Abbott testified he told Quiroga before he would buy a big quantity, he wanted to sample the quality of the heroin (Rec. p. 28). Quiroga responded that he would be agreeable to supplying a sample and would do so in one hour (Rec. p. 28). Abbott then gave Quiroga a telephone number to call him when Quiroga was set to deliver the sample (Rec. p. 29). Before Abbott departed, Quiroga then set the terms and price of the delivery. Price was set at $825 per ounce by Quiroga (Rec. p. 29). Abbott and Harty then left the apartment and returned to Harty's apartment to await Quiroga's call. At this point, neither Abbott nor any of the surveillance agents staked out outside the apartment, followed Quiroga to determine where he went after he departed Perez' apartment.

The next contact occurred at 9:00 p.m. when Quiroga called Abbott and told him that he had the sample ready and set up a meeting at 18th and Blue Island (Rec. p. 30). At 9:40 p.m., Abbott and Harty arrived at 18th and Blue Island, again under the surveillance of other agents (Rec. p. 31). At that time, Abbott saw Perez and Quiroga on the corner and Quiroga walked over to Abbott's vehicle and handed Abbott a tin foil packet, telling Abbott it was the sample (Rec. p. 31). Abbott then told Quiroga that he was going to check out the sample and

would return in 15 minutes (Rec. p. 31); whereupon Abbott left the corner, met with his fellow agents, and field tested the packet receiving a positive reaction (Rec. p. 32). It was stipulated that this packet contained heroin.

Abbott then returned to 18th and Blue Island and again met Quiroga and Perez (Rec. p. 23). Quiroga walked up to Abbott's car and asked him if the sample was all right (Rec. p. 33). Abbott responded that he was ready to do the two ounce deal, but that Quiroga would have to go with Abbott alone with no one else present when the deal was made (Rec. p. 33). Harty then got out of the car and walked over to Perez; Quiroga got in the car with Abbott and directed Abbott to drive to 27th and Wallace (Rec. p. 34). Quiroga told Abbott to drive in a circuitous manner to avoid being followed for 10 minutes before they arrived at 27th and Wallace (Rec. p. 35). However, they were followed by other agents who maintained a surveillance (Rec. p. 148). On the way to 27th and Wallace, Abbott and Quiroga argue and haggle over price, but Quiroga remained firm at $825 per ounce (Rec. p. 36). Quiroga again told Abbott what a good business Quiroga had and that he would be able to supply Abbott with as much heroin as Abbott needed whenever Abbott wanted it (Rec. p. 36).

Upon arriving at 27th and Wallace, Abbott parked the vehicle east of Wallace on 27th Street (Rec. p. 35) and was told to remain in the car by Quiroga (Rec. p. 36). Quiroga told Abbott he was going to get the two ounces from his man (no name was mentioned) and would return in 20 minutes to ½ hour (Rec. p. 36). Quiroga then walked westbound to Wallace and southbound on Wallace out of Abbott's view (Rec. p. 37). However, Agent Schabilion had Quiroga under surveillance and saw him walk into a gangway at 2704 South Wallace and out of view (Rec. p. 148). Schabilion did not see where in the gangway Quiroga went or if he entered any of the buildings or entrances at that location (Rec. pp. 159-160). Defendants' Exhibits, stipulated to by the Government, established that two

buildings are located at 2704 South Wallace with multiple apartments in each and that the gangway goes directly through to the street behind Wallace (Rec. p. 175). It was also stipulated that Appellant Guzman resided at 2704 South Wallace (no mention of which building or apartment) in September, 1976 (Rec. p. 111).

Quiroga was next seen exiting the gangway at 2704 South Wallace one-half hour later and returning to Abbott's car (Rec. pp. 37-148). He then displayed to Abbott two plastic bags of heroin from the waistband of his trousers and gave them to Abbott. Abbott gave Quiroga $1650 in pre-recorded funds (Rec. p. 37) They then proceeded back to 18th and Blue Island where they separated (Rec. p. 38). On the way, Abbott and Quiroga agree to deal directly with each other in the future and circumvent Perez and Harty (Rec. p. 38). It was stipulated that the two plastic bags contained heroin.

Abbott continued on in his testimony that on September 9, 1976 at 8:45 p.m., he received a phone call from Quiroga and discussed making a four (4) ounce transaction (Rec. p. 40). He received another call at 11:30 a.m on September 9, 1976 from Quiroga furthering discussing the four (4) ounce deal (Rec. p. 40). Quiroga told Abbott he would be able to supply as much heroin as Abbott wanted and asked if Abbott would want to purchase four ounces from him now, that he had it immediately available (Rec. p. 40). They set up a meeting at Archer and Halsted that evening to make the deal (Rec. p. 41).

That evening, again under surveillance of other agents, they met at 5:00 p.m in the gas station at Halsted and Archer (Rec. p. 41). Quiroga entered Abbott's car and they discussed the four (4) ounce deal. They talked about price and Quiroga told Abbott that business had been very good for him and everything was going good (Rec. p. 42). Quiroga told Abbott that he (Quiroga) had all the "stuff" Abbott would want and he (Quiroga) would be able to supply Abbott with all he wanted (Rec. p. 42). Quiroga went on to say that he was at that time

sitting on two kilograms of heroin (Rec. p. 42). Quiroga stated he had purchased the heroin and two kilograms had cost him $28,000 a piece. He said that for that reason he could get Abbott as much heroin as Abbott wanted (Rec. p. 42). Abbott then gave Quiroga the $3,300 agreed upon for the four ounce purchase (Rec. p. 42). Quiroga then counted and examined every bill and returned them to Abbott explaining that he had once been "burned" with phony money (Rec. p. 43). Quiroga then told Abbott he was going to get the heroin and would return in a gray 1967 Ford, pull up alongside Abbott's car and hand Abbott a box with the stuff in it and Abbott could then hand Quiroga the money (Rec. p. 43). Quiroga then exited Abbott's car, walked on foot through the gas station lot on the southwest corner of Archer and Halsted and left Abbott's view (Rec. p. 43).

However, surveillance agents picked up Quiroga at that point. Agent Schabilion saw Quiroga walk to a 1967 gray Ford, get in and drive away (Rec. p. 149). He then followed Quiroga to the area of 27th and Wallace (Rec. p. 149), but doesn't see where Quiroga goes because he pulls off and returns to continue the surveillance of Abbott's car at Archer and Halsted (Rec. pp. 149-150). However, Agent Graham was on surveillance in front of 2704 South Wallace at the time, having arrived at 4:25 p.m. the afternoon of September 9, 1976, parking 20 to 30 feet away from the gangway (Rec. pp. 117-118). At 4:35 p.m. he saw Quiroga walk past him to 2704 and enter the location at the east gangway (Rec. p. 118). He didn't see Quiroga ever exit the location and didn't see where he went at the location, but at 5:25 p.m he saw Quiroga again return in the gray 1967 Ford, make a left hand turn, and park in front of Graham's vehicle (Rec. p. 118). Quiroga exited the car and again entered the gangway at 2704 Wallace out of Graham's view (Rec. p. 118). About five minutes later, he exited the gangway, walked across the street carrying a package, got in the car and drove away (Rec. p. 118).

At 5:30 p.m., Quiroga returned to Abbott in the 1967 gray Ford, pulled alongside, handed Abbott a white and blue brush box containing four clear bags of heroin (Rec. p. 44). Abbott then handed Quiroga the money and Quiroga drove off (Rec. p. 44) out of Abbott's view. Agent Schabilion again followed Quiroga to 27th and Wallace (Rec. p. 150) where both Schabilion and Agent Graham, already there on stakeout, observed Quiroga again enter the gangway at 2704 South Wallace (Rec. pp. 119-151). Neither agent could see where Quiroga went, but a short time later (five minutes), Quiroga reappeared in the company of Petitioner. Then they reentered the gray 1967 Ford with Petitioner driving and drive off (Rec. pp. 119-151). It was stipulated that Petitioner owned the 1967 gray Ford (Rec. p. 111).

Abbott next related a conversation he had with Quiroga on September 14, 1976, at about 10:30 a.m. (Rec. p. 45). This conversation was not tape recorded although two other phone conversations were so recorded and notwithstanding the fact that Abbott made the calls himself to Quiroga, rather than receiving them from Quiroga (Rec. pp. 45-84-85). Furthermore, this conversation was never reduced to writing or contained in a report or noted by Abbott (Rec. p. 84). This conversation was objected to by Petitioner's trial counsel (Rec. pp. 45-46) but allowed in over objection by the trial judge and is raised as error herein. In this conversation, Abbott was allowed to testify that he asked Quiroga if Petitioner was his man (Rec. p. 45). Abbott was allowed to testify that Quiroga said "yes, it was" (Rec. p. 45). Abbott then testified that he asked Quiroga if Petitioner's losing four (4) pounds of heroin would affect any further transactions that Abbott may have with Quiroga (Rec. p. 46). Abbott then testified that Quiroga told Abbott not to worry that his man (no name mentioned again) could supply as much stuff as Abbott wanted, and that Abbott shouldn't worry about the four pounds. (Rec. p. 46). Abbott then made arrangements to meet with Quiroga that evening at 17th and Laflin (Rec. p. 47).

They then met at 5:50 p.m. and drove around discussing a two kilogram purchase. At some point during the conversation, Quiroga told Abbott it was important to talk to his man and told Abbott to drive to 1610 South Loomis (Rec. p. 47). Upon arriving there, they double parked and remained in the car. Petitioner came out and talked to Quiroga with Abbott present. Quiroga told Guzman he had something important to talk about and that he would return in five (5) minutes to talk to him. (Rec. pp. 48-49). Guzman then walked back to 1610 South Loomis and Quiroga and Abbott drove off (Rec. p. 49). No narcotic conversations or dealings were mentioned at that point in front of Abbott; Abbott made no attempt to engage Guzman in conversation relative to heroin, future sales or past quality and did nothing to establish first hand or directly that Guzman was in fact the source although by his own admission that was Abbott's purpose and objective and he was trying to climb up the ladder to Guzman (Rec. pp. 77-91). Five minutes later, Abbott dropped Quiroga off at 16th and Loomis and Quiroga told Abbott he would contact him about the two kilos (Rec. p. 49). Nothing ever happened at that point.

The next contact occured about one month later on October 18, 1976, when Abbott called Quiroga (Rec. p. 45). No explanation was offered as to what occurred on the two kilo deal, but Abbott attempts to set up a one pound deal (Rec. p. 49). They meet that day at 1:00 p.m. at 18th and Blue Island and discuss a 15 ounce transaction, but cannot agree on the price (Rec. p. 50). Quiroga also told Abbott that he would want the money in advance on such a large deal to which Abbott refused (Rec. p. 51). No deal was consummated. Quiroga, however, told Abbott that if Abbott changed his mind, Quiroga had as much dope as Abbott wanted right now and that it was at Quiroga's house at that very time (Rec. p. 51). Guzman is in no way directly and circumstantially implicated in this encounter.

Abbott next spoke with Quiroga on November 22, 1976 (again, one month later) at about noontime in a tape recorded

conversation; that tape was played to the jury (Rec. pp. 53-54) and appears in the record, transcribed as Exhibit 8(a). In the conversation, Abbott asked Quiroga how much he can get without having to front any money, and Quiroga responded that Abbott need not worry about that. Quiroga told Abbott to come by him, he (Quiroga) has got it, that if Abbott has his money, he could take it right then and there (Ex. 8(a), pp. 1-2). They then discuss price (Ex. 8(a), p. 3) and agree upon "eight hundred a bunch" (Ex. 8(a), p. 3). Abbott at this point asked for four bunches whereupon Quiroga talked to an unidentified person in the background, saying "can I have four of them . . . he wants four right now . . . don't you want to give him four right now or what . . . "(Ex. 8(a), p. 4). At that point, Quiroga told Abbott he'll call back in a half hour and hangs up.

In a half hour, Quiroga called back and again the conversation is recorded and played to the jury as Exhibit 8(b). Quiroga told Abbott that he has two of them, but is going to hang on to them for himself and asks Abbott to meet him at 6:00 p.m. (Exh. 8(b), p. 5). Abbott then asked Quiroga why he should see Quiroga and he responds that he called up the other guy (unidentified) and he wouldn't let Quiroga have it until about 6:00 p.m. (Ex. 8(b), p. 5). At this point, Abbott tells Quiroga "What's going on . . . one day you're calling me up and asking me if I want to get anything *for you* and then you're calling me if I want to get anything *from* you. What's going on. You know I think you're bullshitting me." (Ex. 8(b), p. 6). This conversation apparently relates back to another conversation not testified to by Abbott wherein Quiroga looks to Abbott as a source from which Quiroga can secure heroin. They then discuss the price and set it at $825 and set up a two ounce sale that afternoon at 2:45 p.m. at Ashland and 18th Street (Ex. 8(b), pp. 7-8). At this point, Quiroga told Abbott he is charging Abbott $825 because it is Quiroga's last two ounces; *i.e.*, the last two ounces Quiroga had, which he previously told Abbott were his, and he was going to keep them. Thus, the sale is agreed

upon for the two ounces originally referred to by Quiroga in the beginning of the conversation.

At 2:45 p.m., Abbott went to 18th and Ashland, again under surveillance, and met Quiroga who, again, is alone (Rec. p. 55). Quiroga asked Abbott to go into 1804 South Ashland to a vacant apartment to get the heroin (Rec. p. 56). Quiroga told Abbott that he could meet Quiroga's man (his source) who was up in the apartment with the two ounces (Rec. p. 56). However, Abbott, although allegedly trying to climb up the ladder to Quiroga's sources, refused to go inside to make the buy and insisted upon remaining in the car (Rec. p. 56). Quiroga finally went to 1804 South Ashland alone and Abbott remained in the car (Rec. p. 56). Quiroga then walked towards 1804 South Ashland and entered a doorway thereby leaving Abbott's view (Rec. p. 58). Other agents also observed Quiroga enter 1804 South Ashland (Rec. pp. 123-134-154). However, no one saw where Quiroga went at the 1804 address.

Agent Abbott and Bobko testified concerning the premises at 1804 South Ashland. Abbott on cross-examination admitted that there were two entrances at 1804 South Ashland, one to go upstairs into the apartments located there, and one to go into the tavern (Rec. p. 94). Abbott didn't know where in the building Quiroga went to get the heroin. Abbott also testified that there were four exits from the 1804 South Ashland building to get to the alley, gangway or garage (Rec. p. 104). Bobko testified that he walked through the gangway at 1804 South Ashland and behind the building there is a garage and back yard area (Rec. p. 141). From that gangway one can enter the garage or the stairway going up to the first, second or third floor of the building (Rec. p. 141). The building has four floors and a lot of traffic in and around it with the tavern (Rec. p. 142). Agents Graham, Bobko, and Schabilion also testified that before meeting Abbott on November 22, 1976, Quiroga had arrived at the corner of 18th and Ashland with Guzman and Gazic and that Guzman and Gazic had left Quiroga on the corner and entered

the tavern at 1804 South Ashland (Rec. p. 123). Quiroga stayed on the corner until Abbott arrived (Rec. pp. 123-133-152-153).

Five minutes after Quiroga entered 1804 South Ashland, he exited from the rear gangway alongside the garage, came out the gangway and re-entered Abbott's vehicle (Rec. p. 58). Quiroga exited the gangway at the rear gateway contiguous to the garage at 1804 South Ashland and walked south from the alley to 18th Street to re-approach Abbott's car (Rec. pp. 134-135-154). As Quiroga reenters Abbott's car, Agent Bobko exited his vehicle and walked to Abbott's car so as to be able to see Quiroga pass the heroin and receive the money from Abbott (Rec. pp. 58-135).

After Quiroga delivered the two ounces to Abbott and received the $1650, he again exited from the vehicle, walked down the alley and re-entered the rear gangway of 1804 South Ashland (Rec. pp. 59-136-155). Thereafter, Abbott left but Schabilion and Bobko remained on surveillance and about 10 minutes later they saw Quiroga re-exit the rear of the gangway at the alley gate of 1804 South Ashland along with Gazic and Petitioner entered Quiroga's 1975 Buick (Rec. pp. 136-155). With Guzman driving, they all go over to 1610 South Loomis where they all enter and the surveillance was terminated (Rec. pp. 136-137-155-56).

The next day, November 23, 1976, at 11:30 a.m., Abbott received another call from Quiroga who asked if Abbott was interested in nine ounces for $825 per ounce (Rec. p. 60). Abbott responded affirmatively and a meeting was set again for 18th and Ashland at 12:30 p.m. (Rec. pp. 60-61). Abbott proceeded to 18th and Ashland again under surveillance and met Quiroga who approached and entered Abbott's car (Rec. p. 61). Quiroga asked Abbott if he had the money, to which Abbott answered affirmatively (Rec. p. 62). Quiroga then told Abbott to remain in the car and he would go get the heroin which was in the garage located across the alley behind 1804 South Ashland (Rec. p. 62). Quiroga then exited the car and entered the rear entrance at 1804 South Ashland (Rec. p. 62).

At this point, Abbott noticed Guzman and Gazic in Quiroga's Buick parked on the corner just west of the alley that runs adjacent to 18th Street (Rec. p. 63). However, prior to Quiroga's returning, the Buick pulled off and departed the area (Rec. p. 158), according to Agent Schabilion. Agent Bobko also testified that before Abbott arrived on November 23, 1976, Quiroga arrived at 18th and Ashland in the Buick with Guzman driving and Gazic in the rear seat (Rec. p. 138).

After Quiroga returned to Abbott's car, again exiting the rear of 1804 South Ashland, he gave Abbott a brown paper bag which Abbott examined and then gave the pre-arranged signal to arrest Quiroga (Rec. p. 63). The bag contained the heroin and was stipulated to contain that substance. Guzman and Gazic are not arrested at this time since they are not present.

Agent Abbott further testified that he arrested Nelson Perez some months later on January 20, 1977, at which time Perez gave a statement implicating Quiroga and no one else (Rec. p. 65). Perez told Abbott that Quiroga had given Perez money to introduce Quiroga to Abbott (Rec. p. 65). There is no evidence whatsoever connecting Perez to Guzman or even inferring they knew one another.

On cross-examination, Abbott testified that during the conversations he had with Quiroga, Quiroga talked about a $56,000 purchase for two kilograms which Quiroga himself was sitting on (Rec. pp. 77-79) and Quiroga had stated that he, himself, had paid $28,000 apiece for the kilos. Abbott also admitted that during these conversations, Quiroga himself had told Abbott that he (Quiroga) personally possessed the quantities necessary to supply Abbott with the heroin he was buying (Rec. pp. 79-80). Abbott further acknowledged that on the 22nd of November, he could have met the source face to face, if there really was one, at Quiroga's invitation, by merely going inside 1804 South Ashland, but that Abbott had declined to do so (Rec. p. 81). Abbott also acknowledged that in this experience in dealing in these cases, the persons he buys from frequently

lie about their source (Rec. pp. 81-82). He also acknowledged that his office had secured a set of Guzman's fingerprints but never conducted any analysis on any of the packages of heroin to see if Guzman's prints were on them (Rec. p. 83). No pre-recorded money was recovered from Guzman and no other evidence linked Guzman to any heroin. Abbott also acknowledged that on all occasions, all dealings were with Quiroga, Quiroga always gave him the heroin and always received the money and he never saw Quiroga give Guzman any money or anything else (Rec. pp. 89-90). The only conversation he overheard between Quiroga and Guzman was the one on the 14th of September at 16th and Loomis and no mention was made regarding heroin and the delivery thereof between Quiroga and Guzman (Rec. p. 90). Abbott himself never talked to Guzman nor did any other agents or witnesses at the trial (Rec. pp. 90-91). Although Abbott had the opportunity to talk to Guzman on September 14, 1976, he chose not to say anything (Rec. p. 91). Abbott then repeated that on October 18, 1976, Quiroga told him that Quiroga had all the heroin Abbott wanted at his own (Quiroga's) house and that on September 9, 1976, Quiroga had two kilograms of heroin and it was his and his alone (Rec. p. 94).

Agent Schabilion testified that after Quiroga was arrested, he toured the neighborhood looking for the Buick automobile, and Guzman and Gazic. He saw the car on Ashland south of 1804 and arrested Guzman and Gazic (Rec. p. 150). Although Gazic was arrested and charged as part of the conspiracy, he was never indicted and was released (Rec. p. 159). The above consisted of the entire evidence presented in this case against Petitioner. The Petitioner presented no testimony and did not testify on his own behalf. The only evidence presented by Appellant consisted of 30 photographs depicting the premises at 2704 South Wallace and 1804 South Ashland showing them both to be multi-family and occupancy structures with various entrances and exits.

The jury found the Defendant guilty of all charges (Counts 1-4-5-6) and he was thereafter sentenced by the court to six years in custody with a special three year parole term.

After Petitioner's conviction and while Petitioner's appeal was pending in the 7th Circuit, Petitioner became aware of some favorable evidence suppressed by the government prior to and during the trial consisting of some other unreported meetings and dealings between Quiroga and agent Abbott, at which and during which Petitioner was neither present nor in any way implicated. Based upon this newly discovered evidence, a motion for a new trial was filed in the District Court on May 8, 1978, and thereafter, an evidentiary hearing thereon was allowed on May 22, 1978 (Sup. Rec. CRp.). The court of appeals stayed the appeal pending resolution of the motion for a new trial. The motion for a new trial alleged newly discovered evidence, the use of false and perjurious testimony by the Government and the suppression of evidence favorable to the Defendant. Evidence on these issues was heard on June 2, 6, and 7, 1978 and on June 19, 1978, Judge Flaum denied the motion. The appeal on the denial of this motion for a new trial was consolidated with the original appeal and the two proceeded together.

The motion for a new trial alleged three basic points of error and related their significance to the particular evidence presented at Petitioner's trial. In essence, Petitioner contends that Abbott lied at the trial insofar as he claimed Quiroga had named Guzman as his source and that Abbott had concealed evidence from the defense by failing to make incident reports concerning certain meetings and narcotic dealings with Quiroga wherein no direct or circumstantial evidence or inferences were present inferring involvement with Petitioner as the source. The motion alleged these factors as being particularly critical in light of the totally circumstantial nature of the evidence against Guzman and the weakness of the proof independent of the alleged implicating co-conspirator statements of Quiroga as testified by Abbott. In light of the weak evidence presented by the Government, it is clear that these meetings between Quiroga and Abbott concerning large narcotic purchases wherein Guzman is not mentioned directly or indirectly nor observed or surveiled anywhere in and around the area, flew in the face of circumstantial theory presented to the jury inferring that on each occasion Quiroga dealt with Abbott, Guzman was hovering in the wings, observing and overseeing the transaction.

The motion alleged that Quiroga was represented by counsel other than Guzman at trial and had plead guilty to the charges prior to Guzman's trial. However, the Government deferred sentencing Quiroga until after Guzman was tried for the obvious reason to preclude him from testifying on behalf of Guzman by hanging an open sentence over his head as deterrent. For this reason, Guzman's counsel was unable to have access to Quiroga as a witness at trial to rebut Abbott's testimony concerning the alleged implicating statements, particularly the September 14, 1976 telephone conversation which remained unrecorded and unreported by Abbott. This conversation, the most damaging piece of evidence introduced against Guzman, rested solely on the uncorroborated testimony of Abbott, and Appellant's trial counsel remained at the distinct disadvantage of facing hearsay testimony of a most damaging nature without any opportunity to cross-examine the utterer (Quiroga) or present any contrary testimony Quiroga may have to offer. Thus, this testimony was allowed to go uncontradicted to the jury.

The motion further alleged that the Government by keeping favorable evidence from the defense was allowed to put before the jury their single source theory implying Guzman as that source when in fact the Government knew of other meetings and dealings Abbott had with Quiroga not only rebutting and impugning that theory, but at the same time demonstrating and establishing that Petitioner was not involved in at least all the dealings of Quiroga.

At the hearing on the motion, Quiroga testified that he was represented by an attorney other than Guzman's trial counsel

(Sup. Trans. p. 4). Quiroga testified that prior to his plea of guilty he knew Guzman's lawyer (Werksman) wanted to talk to him about the case but that his lawyer (Echeles) told him not to because if he got involved as a witness it would go rough for him at sentencing (Sup. Trans. p. 5). Quiroga further testified that his sentencing was purposely postponed by the Government until after Guzman's trial to prevent his talking to Werksman (Sup. Trans. p. 6).

Quiroga then testified that after his sentencing, he contacted Guzman's present counsel by letter in the beginning of April, 1978 (Sup. Trans. p. 6) and was later visited by counsel on April 28, 1978 at which time he gave counsel a statement (Sup. Trans. pp. 6-7). At this conversation Quiroga related how he told counsel for the first time his version of the conversation attested to by Abbott during the trial and particularly the September 14, 1976 conversation. Quiroga also testified he related to counsel other meetings and narcotic dealings with Abbott which Abbott had never disclosed during the trial.

Quiroga was then asked specifically whether on September 14, 1976 he told Abbott, Guzman was "his source" or "his man" and the exact question on page 45 of the original transcript was read to Quiroga as related by Abbott at trial (Sup. Trans. p. 7). Quiroga denied the truth of Abbott's testimony and denied he ever named Guzman as "his man". Quiroga was then asked concerning Abbott's testimony on page 46 of the original transcript relating to the loss of 4 pounds by Guzman affecting further transactions and against Quiroga denied the truth of that testimony (Sup. Trans. pp. 8-9).

Quiroga then testified to his version of these conversations relating that Abbott continually and continuously pressed him about his source and that he (Quiroga) continually and continuously denied Guzman was his source (Sup. Trans. p. 10). Quiroga testified that he and Guzman were good friends having worked together at Western Electric, had played ball together and lived only about one block apart (Sup. Trans. p. 10).

Quiroga kept avoiding these questions by Abbott by telling him that an unnamed wetback or illegal alien was his source (Sup. Trans. p. 10).

When questioned about the conversation concerning the loss of 4 pounds of heroin, Quiroga testified that when Abbott questioned him about the loss he simply told Abbott not to worry about it, that wherever he had to go in the neighborhood there would be a source around to get the heroin (Sup. Trans. p. 11). Quiroga testified that in his neighborhood there were always many and various sources of heroin from which he could get a supply.

Quiroga next testified concerning the conversation testified to at trial by Abbott concerning the drive by 1610 Loomis. Quiroga testified that one day as he and Abbott were driving by, Guzman was in front and Abbott again prodded him about Guzman being his source, saying "there's your man" (Sup. Trans. p. 11). Quiroga denied to Abbott that Guzman was his man (Sup. Trans. p. 11). Quiroga testified that at that time Abbott showed him a newspaper regarding the arrest of Guzman and Quiroga at which time Quiroga testified he told Abbott "look, he has nothing to do with what we are doing—it's just between you and me" (Sup. Trans. p. 12).

Quiroga went on to relate that he had narcotics dealings with Abbott about 10 or 11 times (Sup. Trans. p. 12) far exceeding the incidents attested to by Abbott at the trial. Quiroga testified to a particular incident occurring in October, 1976, involving a meeting with Abbott in Villa Park, Illinois (Sup. Trans. p. 13). Likewise, this incident was never attested to by Abbott at the trial. At this event, Guzman was nowhere around, nor involved (Sup. Trans. p. 13). The event involved the sale of 4 kilos to alleged organized crime figures for $75,000.00 which was brought out to the Villa Park location in the trunk of a Lincoln automobile. This deal was not consummated because Quiroga told the agents that they would have to give him the money up front in advance of delivery because he (Quiroga) was to be the supplier on that deal (Sup. Trans. p. 15).

Quiroga further testified that on many occasions he had discussed with Abbott and asked Abbott if Abbott could get him and supply him (Quiroga) with heroin or other narcotic substances (Sup. Trans. p. 15). On occasion Abbott had offered to supply to Quiroga such substances (Sup. Trans. p. 16).

The next witness to testify at the hearing was Leonard Vecchione who testified that he was a D. E. A. agent and posed as Abbott's mafia relative at the aborted Villa Park sale (Sup. Trans. pp. 58-60). Vecchione acknowledged that no evidence appeared at that meeting in any way linking Guzman to the transaction (Sup. Trans. p. 60). Vecchione admitted that the meeting was set up fully intending to consummate the sale (Sup. Trans. p. 64) and they were prepared to arrest Quiroga on the spot if the sale had occurred. Vecchione acknowledged that many agents were deployed surrounding the area in a surveillance pattern with a pre-arranged converge signal (Sup. Trans. p. 64). Vecchione also admitted that the agents on surveillance were the same agents involved in the case at bar and that Guzman was not observed anywhere near the occurrence (Sup. Trans. pp. 64-65). Vecchione testified that $75,000.00 in official funds were pre-recorded and drawn for use that day and were actually present in a brief case in the trunk of the car (Sup. Trans. p. 63). The agents had at least two days advance notice of the transaction, sufficient time to set up a plan and surveillance (Sup. Trans. pp. 67-68) yet no agent saw or observed Guzman (Sup. Trans. p. 67) nor was anyone specifically assigned to watch or surveil Guzman during this incident to see if he was in any way involved. Vecchione also acknowledged that although when funds such as the $75,000.00 herein involved were drawn, reports of such incidents were usually made, no one to his knowledge made any report of this incident (Sup. Trans. pp. 65-66).

The Government has acknowledged that the defense was not notified of this occurrence before or during the trial and all evidence indicates the defense's first awareness of this transaction was on April 28, 1978 at the Quiroga interview with counsel.

Next to testify was agent Abbott who generally denied the testimony of Quiroga and reaffirmed his trial testimony. Abbott specifically denied Quiroga told him his source was an unnamed Mexican illegal alien (Sup. Trans. p. 75) and denied offering to get and supply drugs to Quiroga (Sup. Trans. p. 77). However, Abbott admitted the Villa Park meeting, the absence of Guzman, the absence of any evidence connecting Guzman to this meeting (Sup. Trans. p. 73) and admitted meeting Quiroga on narcotic related matters on at least two other occasions (Sup. Trans. p. 73). Abbott acknowledged that no reports were made of these meetings and that Guzman was absent and not involved in any of these meetings.

On cross-examination he testified that he became involved in the case when an informer told him he could introduce Abbott to someone he could buy from (Sup. Trans. p. 80). Abbott admitted that Guzman was not named or mentioned as being involved, but only Quiroga was introduced as the supplier (Sup. Trans. p. 80).

Abbott acknowledged that he failed to make a report of the Villa Park incident (Sup. Trans. p. 82) although $75,000.00 advance funds were drawn (Sup. Trans. p. 82), the event was pre-planned in advance, a detailed surveillance was set up with at least ten agents participating (Sup. Trans. pp. 83-85), and none of the ten agents made reports. Abbott acknowledged that none of the eight or more surveillance agents saw or heard of Guzman anywhere near Villa Park that day (Sup. Trans. p. 85) and that they did not even place Guzman under surveillance (Sup. Trans. p. 85). This was done notwithstanding their preparation to arrest Quiroga that day had a delivery occurred (Sup. Trans. p. 86) and the admitted purpose of the investigation was to get to the alleged source of Quiroga (Sup. Trans. p. 91).

Although Quiroga had allegedly indicated to Abbott he had but a single source (Sup. Trans. p. 92) and Abbott proceeded on the theory that only one source was involved, he admitted for some inexplicable reason he neglected to place Guzman

under surveillance. Abbott further acknowledged, that although he was trying to find Quiroga's source, on November 22, 1978, he refused and declined a first hand meeting with the source at Quiroga's invitation (Sup. Trans. p. 93). Abbott acknowledged that narcotics peddlers customarily lie about source and have more than one source (Sup. Trans. p. 101). He also admitted that a source usually keeps a stash or large quantity from which a smaller quantity is taken and sold (Sup. Trans. p. 95). This stash is usually a homogenous quantity of similar properties, texture and composition (Sup. Trans. p. 95). Abbott acknowledged that the various sales by Quiroga were close in time occurring on September 9, 1976, November 22, 1976 and November 23, 1976. Although Abbott testified that all the drugs bought from Quiroga were similar and from the same stash (Sup. Trans. p. 97), the Government stipulated that the quantities from each purchase were different (Sup. Trans. p. 96).

Next, Abbott was examined concerning his denial that he had discussed with Quiroga the possibility that he (Abbott) could become a source of supply for Quiroga (Sup. Trans. pp. 97-98). Abbott admitted that during the taped telephone conversation he referred on tape to a previous conversation with Quiroga wherein Quiroga had called Abbott to get some heroin for Quiroga (Sup. Trans. pp. 99-100).

Furthermore, Abbott admitted that notwithstanding his single source theory, the taped conversation with Quiroga gave reference to multiple sources of supply that he had as well as reference to Quiroga's own stash (Sup. Trans. pp. 106-107-108-109-110). During the initial call, Quiroga talked to at least one source while on the phone, who was then present with Quiroga at the other end of the line (Sup. Trans. pp. 105-106). At this time Quiroga asked if he could have four ounces (Sup. Trans. p. 106). At this time although Abbott initiated the call to Quiroga, neither Quiroga nor Guzman were under surveillance, to determine if Quiroga and Guzman were together at the time of the call, or to identify who Quiroga was talking with at the

other end of the line (Sup. Trans. p. 106). During the second call that day, Quiroga again spoke to a source while on the phone with Abbott (Sup. Trans. p. 107). At this time Quiroga told Abbott he has secured two ounces for himself and would hold on to them and the source then in the room would not give him four ounces to sell to Abbott (Sup. Trans. p. 108). Quiroga then told Abbot that he had "called *up the other guy*" and cannot get the heroin until after 6:00 p.m. (Sup. Trans. p. 109) clearly identifying a distinct secondary source. When confronted with this at the hearing, Abbott acknowledged during cross-examination that during those taped conversations, Quiroga had talked to one source in the room on the first call; said he called a second source during the second call who would not supply until after 6:00 p.m. and at the same time told Abbott that he (Quiroga) personally had two ounces of his own (Sup. Trans. pp. 109-110). In fact, Abbott admitted that the sale on the 22nd of November culminated on this later basis (Quiroga's own two ounces) with Quiroga boosting the price $25.00 per ounce over the agreed price because Abbott was buying Quiroga's personal stash and last two ounces (Sup. Trans. p. 110).

The above consisted of the testimony presented is pertinent insofar as it relates to the issues herein presented.

REASONS FOR GRANTING THE WRIT

(A)

THE ADMISSION OF THE OUT OF COURT DECLARATIONS OF THE ALLEGED CO-CONSPIRATOR VIOLATED THE CONFRONTATION CLAUSE AND DUE PROCESS CLAUSE.

The decision below directly conflicts with substantial constitutional guarantees in that the admission of Quiroga's statements through agent Abbott's testimony violated both the confrontation clause and due process clause of the 5th and 6th Amendment. The Court of Appeals has set an arbitrary and unreasonable standard in allowing into evidence such statements

and has totally misapplied Rule 801(d)(2)(e), Federal Rules of Evidence (28 U. S. C. A.). Furthermore, a serious conflict exists between the various circuits in dealing with the admission of such testimony and the standard of proof preliminary to admissibility of con-conspirator's statements so as to defy reconciliation between the circuits. This serious conflict requires action by this court to clarify the status of the law and also the application of Rule 801(d)(2)(e). It is clear in this case that the Circuit Court of Appeals has failed to follow or comply with this court's standard proof set in *Glasser* v. *U. S.*, 315 U. S. 60, 62 S. Ct. 457 preparatory to allowing such statements into evidence.

The *Federal Rules of Evidence*, Rule 801(d)(2)(E) (28 U. S. C. A.), provides that a statement is not hearsay if it is a statement by a co-conspirator of a party defendant made during the course of and in furtherance of the conspiracy. The Rule is nothing more than a codification of the pre-existing Rule established through a long series of court cases in federal jurisdictions. The Rule itself is simple enough, but its application in the various factual situations in which its application arises has always been a source of concern and difficulty.

Courts of Review have always looked upon the Rule with disfavor recognizing that its application allows into a court proceeding a statement made by a third party who is not in court nor testifying under oath and not subject to the defense scrutiny of cross-examination. Furthermore, said statements usually constitute the most damaging type evidence of guilt presented in the case damning the party against whom they are offered.

This Court has stated concerning this Rule:

> "It is clear that the *limited* scope of the hearsay exception in federal conspiracy trials is a product of the Supreme Court's general *disfavor* of attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." (Emphasis supplied.)

> *Dutton* v. *Evans*, 400 U. S. 74, 91 S. Ct. 210 (1970); *Grunewald* v. *U. S.*, 353 U. S. 391 (404), 77 S. Ct. 963 (1974).

In light of this general disfavor of the Rule and a reluctance to unduly broaden its application, the courts have formulated a number of distinct and specific prerequisites to its application all of which must be strictly met before such statements are admissible against an accused. The necessary criteria or foundation consists of three distinct prerequisites:

1. That the declaration is in furtherance of the conspiracy;
2. That it was made during the pendency of the conspiracy; and
3. That there is independent proof of the existence of the conspiracy and the connection of the declarant and the defendant with it.

Federal Rules of Evidence Rule 801(d)(2)(e) 28 U. S. C. A. See also *U. S.* v. *Snow*, 521 F. 2d 730 (733), (9th Circuit 1975); *U. S.* v. *Carbo*, 314 F. 2d 718 (9th Circuit 1963). The former two criteria are not too evasive or difficult propositions to apply to the given factual context of the cases as they arise, and no issue is raised in concerning these two aspects. Clearly, the declarations involved herein and discussed below meet the first two criteria if the third criteria has been met. However, this third criteria has been the predominant source of legal dispute and trouble since the inception of the doctrine and the Rule and remains the most difficult to comprehend and apply. Also, in this case, the application of the third criteria has caused what Petitioner believes to be constitutional error.

The recent case law, and more particularly since adoption of the *Federal Rules of Evidence*, have held that the question of admissibility rests upon the trial judge in analyzing the above three criteria. Thereafter, it is the jury's function to determine whether or not the evidence, including the declarations (if ruled admissible, of course) is credible beyond a reasonable doubt. *U. S.* v. *Carbo, supra.* In making this determination of admissi-

bility, the test for determining whether the government has established sufficient evidence of a conspiracy, and the Defendant's and declarant's participation therein, is whether substantial proof exists establishing a conspiracy and Defendant's and declarant's connection therewith independent of extrajudicial declarations. *Glasser* v. *U. S.*, 315 U. S. 60, 74-75, 62 S. Ct. 457. See also *U. S.* v. *Spanos*, 462 F. 2d 1012 (9th Cir. 1972); *U. S.* v. *Oliva*, 497 F. 2d 130 (5th Cir. 1974); *U. S.* v. *Fiorito*, 499 F. 2d 106 (7th Cir. 1974). This Court has held that a substantial evidence, independent of the out-of-court declaration of the alleged co-conspirator must amount to proof beyond a reasonable doubt and establish a *prima facie* case of guilt. *Glasser* v. *U. S., supra.* Equally clear is that the hearsay declaration of the co-conspirator or the out-of-court statements implicating the Defendant must be totally ignored and disregarded in making this determination.

In the case at bar, there is simply insufficient independent evidence, aside from the extra judicial declarations of Quiroga, to make out a *prima facie* case against the Appellant sufficient to comply with the *Glasser* standard. There is absolutely no independent direct evidence in this record connecting Appellant to any direct dealings with any witnesses who testified in this case. No money was traced to Appellant, no first hand conversations existed between Appellant and any witness. No drug was found or seen in his possession. All the witnesses dealt directly with Quiroga, bought and received the drugs from him, delivered money to him, and conversed and conspired with him. The only evidence against the Appellant, aside from Quiroga's declarations, was the surveillance testimony of the agents offered circumstantially to attempt to connect Quiroga to Guzman. That evidence was totally circumstantial and no such direct evidence was presented. It must be remembered that where totally circumstantial evidence is relied upon, as here, that evidence should negate every reasonable hypothesis of innocence before it becomes sufficient, independent of credibility considerations, as a

matter of law, to sustain a finding. The circumstantial evidence presented herein was simply insufficient as a matter of law.

In the case at bar, the independent evidence of a conspiracy and Guzman's connection therewith consisted of the following: on the occasion of the September 7th sale, after the sample was delivered by Quiroga, Quiroga and Abbott drove over to 27th and Wallace (Rec. p. 34); Abbott parked on 27th, East of Wallace (Rec. p. 36) and Quiroga left the car (Abbott remained). The surveillance agents saw Quiroga walk into a gangway at 2704 South Wallace and out of view (Rec. pp. 148-159-160). Neither agent saw where Quiroga went or if he actually entered any building. Two buildings are located there, with multiple apartments in each (Rec. p. 175) and it was stipulated that Guzman merely resided at 2704 South Wallace in September, 1976 (Rec. p. 111). Quiroga then exited the gangway and delivered the heroin to Abbott (Rec. pp. 37-148). This was the total independent evidence offered against Guzman as to Count 3 of the indictment and insofar as Count 3 relates to an overt act in furtherance of the conspiracy charged in Count 1. Guzman was not named in Count 3 of the indictment apparently because the Government conceded that this scant evidence was insufficient to connect Guzman to the delivery. However, all the out-of-court declarations made by Quiroga during the September 7th sale were admitted against Guzman.

The next independent evidence offered against Guzman was concerning the September 9th sale. That evidence established that at the meeting at Archer and Halsted, Quiroga arrived, driving Guzman's 1967 gray Ford (Rec. p. 149) and left to pick up narcotics in the car, returning to 27th and Wallace (Rec. p. 149). Quiroga again went into the gangway at 2704 South Wallace (Rec. p. 118) and left the agents' view at that point. The agents could not say whether Quiroga entered either building at that address. About five minutes later, Quiroga reappeared carrying a package, walked across to the 1967 Ford and returned to Agent Abbott to make the delivery (Rec. p.

118, Rec. p. 44). Quiroga then returned to 2704 South Wallace where he reentered the gangway (Rec. pp. 119-157). Again, the agents could not see where he went. About five minutes later, he re-exited the gangway with Appellant and they both got into the gray 1967 Ford and drove off (Rec. pp. 119-151). It was stipulated that Guzman owned the car (Rec. p. 111). The above is the total independent evidence supporting Count 4 of the indictment wherein Guzman was charged and insofar as Count 4 is realleged as an overt act in furtherance of the conspiracy charged in Count 1. The only additional evidence between the September 7th and September 9th incidents, aside from Quiroga's out-of-court conversations, was the use of Guzman's car and Guzman being seen with Quiroga shortly after the delivery. Apparently, the Government feels those two additional factors are sufficient to overcome the evidentiary deficiencies which existed concerning Guzman's implication in the September 7th sale. Again, in connection with this count, the Government offered the full extent of Quiroga's out-of-court conversations with Abbott in hearsay fashion by way of Abbott's testimony against Guzman.

The next independent circumstantial piece of evidence offered against Guzman concerns September 14, 1976, when (aside from the conversations of Quiroga) the evidence shows that Abbott drove Quiroga to Guzman's house at 1610 South Loomis. When there, Guzman comes out of the house and talks to Quiroga in Abbott's presence (Rec. p. 47). Quiroga tells Guzman he has to talk to Guzman about something important and says he will return in a few minutes (Rec. pp. 48-49). Nothing else is said or discussed by Quiroga or Guzman in Abbott's presence and Abbott doesn't say anything at all to Guzman or attempt to engage him in narcotic related conversation. Guzman then returned to the 1610 South Loomis address where it is stipulated Guzman lives (this occurring just five days after the delivery on the 9th when the Government contends Guzman resided at the 2704 South Wallace address). Abbott and Quiroga drive off and converse and Abbott returns and

drops Quiroga off at 1610 South Loomis, whereupon he departs (Rec. p. 45). No narcotic transactions occur as a result of this meeting or incident, although all Quiroga's conversations in the car with Abbott are admitted against the absent Guzman. Another meeting occurs between Quiroga and Abbott on October 18, 1976 regarding a 15-ounce sale, but Guzman is in no way implicated in that matter nor is any circumstantial evidence, by way of presence or surveillance, offered against him. Yet all Quiroga's conversations are again admitted against the again absent Guzman (Rec. p. 45).

The next bit of evidence concerns the November 22nd sale at 18th and Ashland. This time, surveillance establishes that Quiroga goes to the gangway at 1804 South Ashland (a tavern and apartment building) to secure the narcotics (Rec. p. 56). Before meeting Abbott on this occasion, Quiroga arrived on the corner in the presence of Guzman and a third, uncharged, party named Vlado Gazic (Rec. p. 173) and that Gazic and Guzman had left Quiroga on the corner and went into the tavern at 1804 South Ashland (Rec. p. 123). Quiroga did not enter the tavern when he went to get the narcotics but went into the building by the apartments (the other entrance). When Quiroga exited 1804 South Ashland, he exited at the rear in the alley (Rec. p. 58) to deliver the drugs to Abbott. This gangway is contiguous to the garage at the rear of 1804 South Ashland (Rec. pp. 134-135). After Quiroga delivered to Abbott, he re-entered the rear gangway of 1804 South Ashland (Rec. pp. 59-136-155) and 10 minutes later, leaves in the presence of Guzman and Gazic again and gets into Quiroga's Buick and drives to Guzman's house at 1610 South Loomis (Rec. p. 136). This is all the evidence, independent of the out-of-court statements of Quiroga offered against Guzman, concerning Count 5 of the indictment wherein he was specifically charged and insofar as this incident concerns an act in furtherance of the Count 1 conspiracy.

Finally, on November 23, 1976, the next day, (Count 6), again a sale occurs at the 18th and Ashland location with 1804

South Ashland being the alleged location. On this occasion, the only evidence submitted against Guzman was that, again, Quiroga arrived in Guzman's and Gazic's presence in the Buick with Guzman driving (Rec. p. 138). After dropping Quiroga off, they drive off. Thereafter, while Quiroga is with Abbott arranging the sale, Guzman and Gazic are seen parked in the Buick a short distance away (Rec. p. 63). However, before the sale goes down, Guzman and Gazic pull off and depart the area (Rec. p. 158). This time, Quiroga retrieves the narcotics from the garage behind 1804 South Ashland and delivers them to Abbott, whereupon Quiroga is arrested. The agents then tour the neighborhood looking for the again absent Guzman and find him in Quiroga's Buick driving on Ashland Avenue (Rec. p. 159) and arrested both individuals, although Gazic was never charged and was later released (Rec. p. 159). This is the only independent evidence presented concerning Count 6 of the indictment with which Guzman was charged and, again, all Quiroga's oral declarations to Abbott in the absence of Guzman were admitted.

Thus, it can be seen that no independent evidence was submitted connecting Guzman with any actual receipt of money, negotiations for any sales, possession or any drugs or any other direct dealing with the witnesses. The independent evidence can best be characterized as (1) Guzman's presence on a number of occasions in and around the proximity of the sale and deliveries; (2) the use of Guzman's car by Quiroga for one delivery; (3) Guzman's driving Quiroga's car on the date of the November 22nd and 23rd deliveries; and (4) Quiroga's going to 2704 South Wallace on the September 7th and 9th deliveries although no one saw him at any time securing the drugs from Guzman and on September 7th, no one ever put Guzman present at the 2704 South Wallace location. This, then, is the entirety of the evidence this Court must consider to see if proof beyond a reasonable doubt exists establishing a *prima facie* case sufficient to ground a finding of guilty on the conspiracy charge and De-

fendant's connection therewith. For this purpose, this Court, as the trial court was required, must disregard all the out-of-court declarations of Quiroga. Clearly, this evidence is insufficient as a matter of law. At best, the Government's circumstantial independent evidence presented a situation of suspicion and probability, but not proof establishing a *prima facie* case. The mere repeated presence of Guzman, or other evidence imputing knowldege, without some evidence showing actual participation or connection was insufficient as will be pointed out below. It was really the out-of-court statements themselves, corroborated by independent circumstantial evidence, that convicted Guzman. The law contemplates the reverse situation that the independent evidence corroborated or supported by the out-of-court declaration supports the conviction. In this case, the single and only piece of evidence directly connecting Guzman in any conspiracy is the conversation of Quiroga naming Guzman as his source or main man (Rec. p. 45) corroborated by the other out-of-court conversation referring to "his man" as the source of the heroin. Under this factual context the admission of such statements violates due process and confrontation principles and guarantees.

The Government could have easily secured sufficient independent evidence in this case *aliunde*, the out-of-court declarations of Quiroga on at least two occasions. On September 14th, when Quiroga had Abbott drive him over to 1610 South Loomis and talk with Guzman, Quiroga and Abbott were allegedly negotiating a large sale. The Goverment would have us believe, and indeed their argument was that the "something important" Quiroga had to talk to Guzman about was the big sale. Abbott also admitted that the purpose of his investigation was to climb up the ladder beyond Quiroga to his supplier. Yet when Abbott is in Guzman's presence at the car, he neither engages Guzman in conversation about past heroin supplies, their quality, etc., nor engages him in direct conversation about the future big sale he is negotiating with Quiroga and Guzman is allegedly supply-

ing (Rec. p. 90-91). All Abbott had to do, if Guzman was truly a conspirator or supplier, was to enage in any slight narcotic-related conversation and Abbott would have had direct independent evidence. But he did nothing, apparently believing his own theory that Quiroga was conning Abbott and was the real source himself (Rec. Ex. 8(b), pp. 5-6). Secondly, at the November 22nd sale at 1804 South Ashland, when Quiroga tells Abbott the heroin was up in the second floor apartment, he also invites Abbott up to the apartment to make a direct head to head buy from "his source". What a classic opportunity to secure the desired goal and climb up the ladder to Quiroga's source. However, what does Abbott do? He declines and chooses to remain in the car and let Quiroga go in alone (Rec. pp. 56-81). He does this notwithstanding the fact that he has ample protection from a number of surveillance agents present in the area and had dealt with Quiroga before and never had any reason to suspect Quiroga for his own personal safety. Furthermore, it must be pointed out that at the time Quiroga tells Abbott his source is up in the second floor apartment, the other agents saw Guzman and Gazic, not enter the apartment side, but saw them in the bar or tavern at 1804 South Ashland (Rec. pp. 123-152). It must be remembered, as Bobko testified, there were two entrances to 1804 South Ashland, one for the bar and one for the apartments. Guzman and Gazic went in the bar (Rec. pp. 94-123). Thus, the evidence refutes the fact that Guzman was the source, if Quiroga is to be believed, because Guzman could not have been in an apartment on the second floor when the other agent placed him in the tavern. Thus, this factor has dual significance in that it clearly demonstrates the Government had the availability of proper direct evidence to secure against Quiroga's actual source and co-conspirator, if one existed, and, secondly, that had they pursued it, that direct evidence would probably not have led them to Guzman but some other person.

Also, much of the independent evidence the Government itself presented in this case rebuts and contradicts the circumstantial

evidence pointing to Guzman as the source or a co-conspirator, thereby undermining the Government's case and supporting the reasonable hypothesis of innocence rule concerning the sufficiency of circumstantial evidence. Abbott admitted quite candidly that in his experience narcotic peddlers, such as Quiroga, quite often lie about the source to cover up (Rec. pp. 81-82). Abbott also admitted that Quiroga repeatedly stated that he, Quiroga, had the heroin personally, that he was supplying and would repeatedly brag about how much heroin he personally possessed and could supply (Rec. pp. 27-28-36-40-42-51-77-79-80, Ex. 8 (a) pp. 1-2; Ex. 8(b) pp. 7-8). Also, Perez in introducing Quiroga to Abbott never mentioned Guzman as the source but that "Jack" (Quiroga) was the one who had a real nice business going and would be able to take care of as much heroin as Abbott wanted (Rec. p. 27). Only alternatively would Quiroga mention his "man" or "source" as the supplier and, in fact, this conflict in Quiroga's conversations with Abbott led Abbott to question Quiroga's truthfulness during the tape recorded conversation on (Rec. Ex. 8(b) p. 6) November 22nd when Abbott accused Quiroga of "bullshitting" him. Further, Abbott acknowledged that Quiroga, at the September 9th sale, while seated in the car before the delivery, stated that at that very time he was personally sitting on two kilograms of heroin that had cost him personally $28,000 apiece (Rec. p. 42). Quiroga had stated that these were his and he had purchased them himself for $28,000 each. He also stated that was why *he* could supply Abbott with all the heroin Abbott wanted (Rec. pp. 42-94). This, clearly, rebuts and refutes any theory that Quiroga needed Guzman as a source if he, himself, possessed two kilograms at the time of the sale and clearly flys in the face of the Government's conspiracy theory.

Finally, on the tape recorded conversation before the November 22nd sale, the transcript shows Abbott and Quiroga arguing over the price because Quiroga raised the price from $800 per ounce to $825 per ounce (Rec. Ex. 8(a), p. 28). It should also

be remembered that on all occasions it was Quiroga and no one else who set the price of these transactions and he never had to consult with anyone else first, another factor refuting any source or co-conspirator. Earlier in the tape conversation, Quiroga personally had two ounces for himself but he was keeping it and couldn't deliver that (Ex. 8(b), p. 5). But later in other conversations, he tells Abbott he is charging $825 per ounce because he will be delivering to Abbott, Quiroga's last two ounces—the last two ounces he referred to earlier as his own—that he was going to keep (Ex. 8(b), pp. 5-7-8). Thus, the source on the November 22nd sale was Quiroga's own two ounces, if Quiroga could be believed, as proven by the taped conversation itself. This, again, clearly refutes any conspiracy. Thus on these two overt counts (Counts 4 and 5) and on these two acts charged in furtherance of the conspiracy concerning the September 9th and November 22nd sales, Quiroga's own statements refute any conspiracy and point to himself as the supplier. Furthermore, the tapes below also show that Quiroga shopped around and bought for himself on occasions and even tried to buy some heroin from Abbott for resale. In that conversation, Abbott tells Quiroga, "What's going on—one day you're calling up and asking me if I want to get anything *for you* . . ." (Ex. 8(b), p. 6). Thus, Quiroga was trying to buy from Abbott also and this indicates that Quiroga would buy where he could and had multiple sources. This, again, refutes the circumstantial evidence pointing at Guzman.

In addition to the above, it should be pointed out that none of the prerecorded funds used in the transaction were recovered from or found on Guzman at his arrest or thereafter. It should be noted that although the Government had secured a set of Guzman's fingerprints, none of his prints were ever found on any of the packages of heroin or the box used by Quiroga on September 9th (Rec. p. 83). Nobody ever saw Quiroga give Guzman any money or secure any heroin from Guzman (Rec. pp. 89-90). All dealings were solely with Quiroga (Rec. pp. 89-

90). The only conversation overheard between Quiroga and Guzman was on the occasion of September 14th in front of 1610 South Loomis and no mention was made by any narcotic related conversation (Rec. p. 90). At Guzman's arrest, after the November 23rd sale, no heroin or prerecorded money is found on him (Rec. p. 159). Concerning the November 22nd, and November 23rd incidents, Gazic's involvement was identical to that of Guzman and the independent evidence concerning each's involvement was the same. Yet, Gazic was never indicted and Guzman is not only indicted but convicted.

Thus it can be seen that the independent evidence, *aliunde* the hearsay declarations of Quiroga implicating Guzman, was thin at best and then was impeached and refuted by other of the government's own circumstantial evidence so as to render it totally insufficient. The circumstantial evidence, *aliunde* the co-conspirator's declarations, is not of the quality so as to justify admission under the *Glasser supra,* standard and for that reason certiorari should be granted.

Futhermore, in looking at the case at bar, both within the 7th Circuit and from the various other circuits in the United States, it is immediately apparent that a serious conflict exists in interpretation of the standard of admissibility of such statements under Rule 801(d)(2)(e). Each circuit has set its own standard, none reconciable with the other and even within the 7th Circuit various cases have set different and contradictory standards. The confusion created has rendered the status of admissibility totally arbitrary, capricious, and vicarious depending solely upon which precedent a given court at a given time applies and follows. This court should immediately end this situation, address the problem and set a uniform standard to insure even handed treatment and fairness in the administration of justice.

The state of the law with respect to the degree of proof required to establish a conspiracy is totally unclear, clouded, confusing and irreconcilable between the circuits. The language of

the cases is not definitive and comparison of the espoused standards between the circuits is confusing if not completely impossible. The standard is variously described as "substantial independent evidence" (*United States* v. *Dixon*, 562 F. 2d 1138 (9th Circuit 1977)); "a preponderance of the evidence" *U. S.* v. *Stanchich*, 550 F. 2d 1294, (2nd Circuit 1977), *United States* v. *Trotter*, 529 F. 2d 806 (3rd Circuit 1976), *United States* v. *Jones*, 542 F. 2d 186 (4th Circuit 1976); "a *prima facie* case" *U. S.* v. *Carbo*, 314 F. 2d 718 (9th Cir. 1963) cert. denied, 377 U. S. 953; *United States* v. *Morton*, 483 F. 2d 573 (8th Cir. 1973) "an ordinary civil standard." *United States* v. *Petrozziello*, 548 F. 2d 20 (1st Circuit 1977). These various standards are totally confusing, irreconcilable and defy comparison between circuits. Furthermore, they fail to apply or comport with this court's enunciated standard in *Glasser, supra.*

In the 7th Circuit, the circuit from which this case eminates, apparently the court has adopted multiple standards each mutually exclusive and irreconcilable with the other. In *United States* v. *Fiorito*, 499 F. 2d 106 (7th Circuit 1974), the court adopted the substantial independent evidence standard enunciated in *Glasser*, supra and *Carbo*, supra. In *United States* v. *Santiago*, 583 F. 2d 1128 (7th Cir. 1978), the court adopted the "preponderance of evidence" test. Yet in application in the district court, some judges have their own test enunciated as:

> "Declarations of alleged co-conspirators are admissible against a defendant if there is substantial independent evidence from which a *reasonable mind could infer a conspiracy.*"

See *U. S.* v. *Herrera*, 470 F. Supp. 766 (N. D. Ill. 1975). Since in the case at bar, the circuit court did not render a written opinion it is shear speculation as to which standard they applied or followed in affirming Petitioner's conviction. In fact, the government relied upon both *Santiago* and *Herrera* in urging the Court of Appeals to take their pick. Clearly these conflicts and confusions should not be allowed to continue and go unchecked. For this reason alone, certiorari should be granted.

(B)

THE PETITIONER WAS DENIED DUE PROCESS WHEN THE GOVERNMENT CONCEALED FAVORABLE EVIDENCE FROM THE DEFENSE WHICH THE DEFENSE COULD NOT REASONABLY DISCOVERED PRE-TRIAL AND WHICH IF DISCLOSED COULD HAVE MATERIALLY ALTERED THE OUTCOME OF THE TRIAL.

A substantial constitutional question is presented by this case which the court should decide as to whether petitioner's constitutional rights were violated under the court's holding in *Brady* v. *Maryland*, 373 U. S. 85, 83 Sup. Ct. 1194 and *United States* v. *Agurs*, 427 U. S. 97, 96 Sup. Ct. 2392 in light of the government's suppression of evidence indicating additional narcotic meetings and transactions between Quiroga (the seller) and agent Abbott (the buyer), at which the petitioner was not present nor in anyway connected. This question is of greater magnitude and concern in light of the totally circumstantial nature of the government's evidence and theory of the case against Petitioner. The government contended that since petitioner was always present in and around these sales and contacted by Quiroga this cumulatively established circumstantially that he was the source. The suppressed evidence totally contradicted this theory and refuted and contradicted that inference and conclusion.

At the hearing on the motion for a new trial, Quiroga testified that although he had plead guilty prior to Appellant's trial, the Government delayed his sentencing until after Guzman's trial. Quiroga also testified that he was advised not to talk to Guzman or the Government would make it bad on him at sentencing (Sup. Trans. p. 5). Thus, although Quiroga knew Guzman's lawyer wanted to interview him concerning the conversations attributed to him by Abbott, he refused to do so in accordance with his attorneys instructions (Sup. Trans. p. 5). Thus, the Government by hanging sentencing over Quiroga,

prevented the defense from discovering what Quiroga had to say concerning the alleged co-conspirator statements as well as discovering these numerous unreported meetings between Quiroga and Abbott dealing with other narcotic transactions.

It must be remembered that Guzman was not alleged to be present at nor aware of any of these other meetings and admittedly was not present at these alleged statements. Furthermore, Abbott left all these conversations out of his case report. Thus, there is no way to impute knowledge to the defense of the existence of this evidence. Furthermore, the only two possible sources of this evidence, Quiroga and Abbott were both uncooperative with and unavailable to the defense for pre-trial interview. For these reasons, the complained of evidence was not available to the defense nor reasonably discoverable by it through the exercise of due diligence prior to trial.

Secondly, the concealment of this evidence from the defense was directly attributable and resulted from action chargeable to the Government. Clearly, the knowledge and actions of agent Abbott are chargeable to the prosecution due to the peculiar relationship he enjoys as a Government agent and as the chief prosecution witness. *Moore* v. *Illinois*, 408 U. S. 786, 92 Sup. Ct. 2562. Moreover, the fact that the defense was precluded from learning of this evidence from Quiroga prior to trial is also the direct and proximate result of conduct attributable to the Government, in that they delayed Quiroga's sentencing until after Guzman's trial to neutralize him as witness on behalf of Guzman by intimidating him with the threat of a heavy sentence. See *Norris* v. *Layton*, 540 F. 2d 1241 (4th Cir. 1976), *Cannon* v. *Alabama*, 558 F. 2d 1211 (5th Cir. 1977).

This court has held that for purposes of the *Brady* rule, the prosecution is charged with knowledge of the significance of evidence favorable to the defense even if the prosecution is in good faith actually unaware of it and may have overlooked it. See *U. S.* v. *Agurs, supra*. Evidence which consists of impeaching testimony of a Government witness falls within the *Brady*

rule when, as in the case at bar, reliability of that Government witness may be the determining factor of guilt or innocence. In the case at bar it is quite apparent that Abbott's testimony was critical to securing any conviction against Guzman and was indeed the only testimony of the alleged out of Court co-conspirator statements of Quiroga.

In determining whether the prosecutor's failure to disclose evidence to the defense denied the Petitioner a fair trial, the omission must be evaluated in the context of the entire record and if the verdict is supported by already weak and questionable evidence, the additional evidence suppressed, whether impeaching or substantive, may be of a relatively less important or of minor consideration, in order to be sufficient to require reversal. *U. S.* v. *Agurs, supra*. On the other hand, there are situations in which evidence is so obviously of such substantial value to the defense that elementary fairness requires production by the Government even without a specific request for it by the defense, *U. S.* v. *Agurs, supra.*

This Court in *Agurs* found the *Brady* rule applicable in three quite different situations involving the discovery, after trial, of information which had been known by the prosecution but unknown to the defense. The first situation is typical where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew or should have known of the perjury. In these situations the standard to be used is that if there is merely a reasonable likelihood that the false testimony could have affected the judgment of the jury the conviction must be set aside. *U. S.* v. *Agur, supra, Mooney* v. *Holohan*, 294 U. S. 103, 55 Sup. Ct. 340. In the case at bar, the Petitioner had alleged misconduct of this magnitude and had argued at length that the evidence supports the unquestionable finding that Abbott's testimony concerning the source declarations was less than truthful. Those arguments are incorporated herein. Thus, if this Court finds questionable Abbott's testimony concerning source, the lesser standard of

"materiality" or "reasonable likelihood" must be employed to the consideration of the perjured testimony and the suppression of the favorable evidence impeaching Abbott and establishing the perjury. The trial Court clearly failed to take these factors into consideration when he unilaterally ruled that the sole issue was a head to head comparison between Abbott and Quiroga finding Abbott credible and Quiroga incredible. None of the underlying corroborative and impeaching factors were considered in regard to either of their testimonies. The issue was resolved superficially.

The second situation is characterized by a pre-trial specific request for the evidence and suppression of that evidence. It involves application of a middle-strata standard wherein the suppressed evidence must involve a level of materiality *which might have* affected the outcome of the trial. *U. S.* v. *Agur, supra, Brady* v. *Maryland supra.* In the case at bar, there was no specific request because the defense had no knowledge of the existence of the evidence upon which to base such a request and for this reason, this analysis in inapplicable. See *U. S.* v. *Hedgeman,* 564 F. 2d 763 (7th Cir. 1977).

The third situation however, recognizes the dilemma confronting the defense in the case at bar, *i.e.* being unable to make a specific request due to ignorance of the existence of such evidence. The Court in *Agur* went on to discuss that in a great many cases exculpatory information in the possession of the Government may be unknown to the defense and as such the defense may make no request at all or merely a general request for all *Brady* type material. The Court found this latter general request no better than no request at all under the circumstances. The Court thus held that if a duty to disclose based upon this third type of situation exists at all, it must derive from the obviously exculpatory character of the evidence itself. Thus, if the evidence is so clearly supportive of a claim of innocence, based upon the entire consideration of the nature and status of the entire Government evidence against the accused, it creates

a duty of disclosure upon the Government even if no request was made. Thus the Court went on to establish the third situation and test to be applied when only a general request or no request had been made. The Court held:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity additional evidence of *relatively minor importance* might be sufficient to create a reasonable doubt. *U. S.* v. *Agur* supra at page 2402. (Emphasis added.)

Furthermore, evidence of which is solely of an impeaching nature may and has qualified as sufficient to warrant such reversals. See *U. S. ex rel. Marzeno* v. *Gengler,* 574 F. 2d 730 (2nd Cir. 1978); *Norris* v. *Layton,* 540 F. 2d 1241 (4th Cir. 1976); *Cannon* v. *Alabama,* 558 F. 2d 1211 (5th Cir. 1977). The question is whether the suppressed evidence is critical in light of the quantum of other evidence presented by the Government which remains unaffected by the suppressed evidence, supporting the Defendant's guilt. "Critical evidence" for the purpose of due process is evidence that when developed by skilled counsel and experts *could* induce reasonable doubt in the minds of enough jurors to avoid conviction.

Thus, the issue in the case at bar, concerning this third type of *Brady* situation, revolves down to a question of whether or not the previously unavailable testimony of Quiroga relating to perjury by Abbott and the suppressed evidence concerning the other meetings and dealings between Quiroga and Abbott without Guzman's participation or involvement, amounts to "critical evidence" when viewed in the light of the remaining independent evidence in the record implicating Guzman. An analysis of the evidence in this case clearly demonstrates that the suppressed

evidence was critical under the tests enunciated above, and when viewed in light of the entire record, this evidence if disclosed to the Defendant could have quite easily raised a reasonable doubt in the jurors' mind of Guzman's guilt or involvement.

A review of this case clearly demonstrates the weak nature of the Government's case against Guzman which independent of the co-conspirator statements consisted solely of circumstantial evidence. The strongest evidence consisted of the heretofore undenied co-conspirator statements. These statements are now questioned and specifically denied by Quiroga.

The circumstantial evidence itself is now seriously questioned. The theory of the Government in presenting the circumstantial evidence and the nature of the evidence created the inference that in all the instances of dealings between Quiroga and Abbott, somehow or somewhere Guzman was present within access to Quiroga or in fact with Quiroga. The Government's circumstantial evidence sought to establish inferentially that every time Quiroga sold and delivered he had some contact or involvement with Guzman. The suppressed evidence clearly impeaches this theory and any inference of this nature flowing from it. The evidence rebuts this type of conduct or involvement between Quiroga and Guzman on all such occasions. Thus, this suppressed evidence weighed directly on the sole and already tenuous thread connecting Guzman to this transaction and quite obviously in light of the totally circumstantial nature of the evidence at trial, could have quite easily created a reasonable doubt of guilt at trial. Furthermore, the evidence weighed heavily on the credibility of the Government's main witness against Guzman and the sole witness to these alleged incriminating co-conspirators statements. For these reasons, certiorari should be granted.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and order of the Circuit Court of Appeals, 7th Circuit.

Respectfully submitted,

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July 6, 1979

APPENDIX "A"

UNPUBLISHED PER CURIAM ORDER

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 6, 1979

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JOHN W. PECK, *Senior Circuit Judge**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 77-2294
& 79-1119 *vs.*

SALVADORE GUZMAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76-Cr-1226

Joel M. Flaum, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

* Honorable John W. Peck, Senior Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

No. 79-24

In the Supreme Court of the United States

OCTOBER TERM, 1978

SALVADORE GUZMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OCTOBER TERM, 1978

No. 79-24

SALVADORE GUZMAN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals did not write an opinion (Pet. App.).

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1979. The petition for a writ of certiorari was filed on July 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether out-of-court statements by one of petitioner's co-conspirators were properly admitted into evidence.

2. Whether petitioner was entitled to a new trial on the basis of his allegations that the government concealed exculpatory evidence.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on three counts of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of six years' imprisonment on each count followed by a three-year special parole term. The court of appeals affirmed (Pet. App.).

The evidence at trial showed that on September 7, 1976, Andrew Abbott, a Chicago police officer working in an undercover capacity with the Drug Enforcement Administration, met with Jack Quiroga and arranged to buy two ounces of heroin (Tr. 23-29, 114-115, 145-146).[1] Later in the evening, after conducting a field test on a sample of heroin he received from Quiroga, Agent Abbott went with Quiroga to pick up the two ounces of heroin he had agreed to purchase (Tr. 30-37, 115-117, 147). On the way, Quiroga informed Abbott that his supplier could provide Abbott with as much heroin as he needed (Tr. 36-37). Quiroga then left Abbott in the car and walked to an alleyway on the south side of petitioner's residence at 2704 South Wallace (Tr. 36-37, 113). A half hour later, Quiroga emerged from the alley, returned to the car, and gave Abbott two bags containing heroin. Abbott in turn paid Quiroga $1,650 (Tr. 38-39, 148; Govt. Exh. 2).

[1]Quiroga pled guilty to possession with intent to distribute and conspiracy.

On September 9, 1976, Agent Abbott received a telephone call from Quiroga, and the two men arranged a four-ounce heroin sale. Again, Quiroga told Abbott that his supplier could provide sufficient heroin to satisfy Abbott's needs. Abbott and Quiroga agreed to meet later in the day. Shortly before the meeting, Quiroga was seen entering the alley that led to the apartment building in which petitioner lived (Tr. 118). When Quiroga met Agent Abbott 30 minutes later, they again discussed the four-ounce heroin transaction and Abbott gave Quiroga $3,300. Quiroga counted the money and returned it to Abbott. He told Abbott he would return shortly in a 1967 gray Ford, and they would exchange the money and heroin through the car window. Quiroga then left Abbott and walked to a 1967 gray Ford parked nearby. The car was registered to petitioner. Quiroga drove the car back to the alley near petitioner's building (Tr. 40-43, 113, 118-119, 149). Five minutes later, Quiroga left the building and drove the Ford to the place where Agent Abbott was waiting. Quiroga handed Abbott a box containing four bags of heroin (Tr. 44, 118-119; Govt. Exh. 3), and Abbott gave Quiroga the $3,300. Quiroga then returned to 2704 South Wallace, and soon thereafter he and petitioner left the building and drove away in the Ford (Tr. 119, 149-151).

On September 14, 1976, during a telephone conversation with Agent Abbott, Quiroga stated that petitioner was his supplier (Tr. 45). The two men agreed to meet that evening, at which time they discussed Abbott's possible purchase of two kilograms of heroin. Quiroga insisted on seeing his supplier and told Abbott to drive him to 1610 South Loomis, a former residence of petitioner's (Tr. 113). When they arrived, petitioner came out of the building and talked with Quiroga at the car.

Quiroga told petitioner that he wanted to speak with him about something important and would return in five minutes. Petitioner reentered the building, and Quiroga, after driving around for a few minutes with Abbott, asked the agent to take him back to 16th and Loomis (Tr. 45-49, 113, 120-121). Abbott did so and Quiroga entered the building at 1610 South Loomis (Tr. 121).

In two taped telephone conversations on November 22, 1976, Quiroga and Agent Abbott made arrangements for another heroin transaction. That afternoon petitioner, Quiroga, and a third man were seen standing at the corner of 18th and Ashland. Petitioner and the third man went into the building at 1804 South Ashland (Tr. 123, 132-133, 153), and shortly thereafter Abbott arrived and met Quiroga (Tr. 56, 123, 134). Quiroga told Abbott that the heroin and his supplier were in the building at 1804 South Ashland. Quiroga entered the building and returned about five minutes later with two ounces of heroin, for which Abbott paid $1,650 (Tr. 134-135, 154). Quiroga then returned to 1804 South Ashland and was later seen leaving with petitioner and the third man (Tr. 56-59, 113, 136-137, 155-156).

On November 23, 1976, Quiroga called Agent Abbott and offered to sell him nine ounces of heroin at $825 an ounce. The men agreed to meet at 18th and Ashland. Quiroga arrived in a car driven by petitioner. Petitioner and a third man remained in the car and parked nearby. Quiroga met Abbott on the corner and told him that the heroin was in a garage behind 1804 South Ashland. Quiroga left Abbott, and when he returned he gave Abbott nine ounces of heroin. Quiroga and petitioner were then arrested (Tr. 60-64, 138-140, 150, 157-159).

ARGUMENT

1. Petitioner contends (Pet. 23-36) that the government presented insufficient independent evidence of his involvement in the conspiracy to justify the admission of the out-of-court statements of the co-conspirator Quiroga. This argument is without merit.

The government introduced adequate independent evidence tending to show the existence of a conspiracy and petitioner's participation therein.[2] On September 7 and 9, the heroin transactions could not be completed until Quiroga went to petitioner's residence. On the latter occasion, Quiroga used petitioner's car in the course of his dealings with Agent Abbott. He then returned to petitioner's residence and was seen leaving with petitioner immediately after the sale was completed. During negotiations for another drug deal on September 14, Agent Abbott and Quiroga again went to petitioner's residence, although no transaction occurred that day. On November 22 and 23, petitioner arrived with Quiroga shortly before the drug sales, and he remained in the area while the transactions were completed.

Petitioner correctly observes (Pet. 35-36) that the courts of appeals have adopted somewhat different formulations to describe the quantum of independent evidence of a defendant's participation in a conspiracy that must be introduced in order to justify the admission of out-of-court co-conspirator statements. The cases are collected in the government's brief in opposition in *Macklin* v. *United States*, cert. denied, No. 77-6895 (Oct. 2, 1978).[3] See also *United States* v. *James*, 590 F. 2d 575 (5th Cir.) (en banc),

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[2]A defendant's participation in a conspiracy may be established by circumstantial evidence. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

[3]A copy of this brief has been sent to petitioner.

cert. denied, Nos. 78-1412, 78-6369, and 78-6431 (June 4, 1979). But, as we have frequently stated in our oppositions to certiorari petitions in this Court, it seems likely that, whatever the proper standard for determining the admissibility of co-conspirator statements, variation in its phrasing will seldom, if ever, produce different results. Here, for example, the independent proof was sufficeint to satisfy the "prima facie" test advocated by petitioner (see, *e.g.*, *United States* v. *McManus*, 560 F. 2d 747 (6th Cir. 1977); *United States* v. *King*, 552 F. 2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977)), the "preponderance of the evidence" standard (see, *e.g.*, *United States* v. *Mangan*, 575 F. 2d 32 (2d Cir. 1978); *United States* v. *Petrozziello*, 548 F. 2d 20 (1st Cir. 1977)), and the "substantial independent evidence" test attributed by petitioner to *United States* v. *Dixon*, 562 F. 2d 1138 (9th Cir. 1977). Accordingly, resolution of the verbal inconsistencies in the circuits' formulation of the proper standard would not aid petitioner. The evidence presented was sufficient under any test, and this case therefore is not an appropriate vehicle for the Court's review of the question.

2. Petitioner also argues (Pet. 37-42) that the district court erred in denying his motion for a new trial on the basis of the government's alleged suppression of evidence of another drug deal between Agent Abbott and Quiroga at which petitioner was not present. In light of the character of the "newly discovered evidence," the district court did not abuse its discretion in refusing to grant a new trial.

At an evidentiary hearing held on petitioner's motion, Quiroga denied ever having named petitioner as his heroin source and further stated that his suppliers were two illegal aliens, Chango and Jose, whose last names and addresses he did not know. Quiroga also testified that he

and Agent Abbott had engaged in another attempted heroin transaction in Villa Park, at which petitioner was not present. Agent Abbott did not describe this incident in his testimony at petitioner's trial. At the hearing on the new trial motion, government agents confirmed Quiroga's account of the attempted drug deal at Villa Park; they explained, however, that because the transaction was not completed, it yielded no information useful to their investigation and therefore was not reported (Supp. Tr. 8-10, 15-16, 26-31, 60, 64, 66, 70-77, 81-83).[4]

The testimony at the hearing showed that the "newly discovered evidence" existed before trial and could have been discovered with due diligence. Petitioner knew Quiroga's role in the case, yet he made no effort to call Quiroga as a witness.[5]

Moreover, had it been introduced at petitioner's trial, the "new" evidence would not probably have produced an acquittal. Even if petitioner was not present at the Villa Park meeting, his absence on that occasion does not negate his involvement in the drug transactions charged in the indictment, nor does it contradict any testimony that

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[4]"Supp. Tr." refers to the transcript of the hearing on petitioner's motion for a new trial.

[5]Petitioner's assertion that the government prevented Quiroga from testifying is erroneous. Quiroga pled guilty on November 11, 1977, at which time the district court ordered a pre-sentence investigation report and set December 15, 1977, for sentencing. Petitioner's trial began on November 14, 1977, and concluded four days later. Petitioner did not request a continuance so that Quiroga could testify after he was sentenced. The government did not suggest or recommend Quiroga's sentencing date, which the district court set at a normal and reasonable time after the guilty plea.

Agent Abbott gave.[6] At most, the evidence would have been marginally relevant to negate any impression the jury may otherwise have had that petitioner was present every time Quiroga and Abbott met for a heroin transaction. In light of the marginal materiality of this evidence, it afforded no basis for a new trial.

In sum, Quiroga's proffered testimony did not satisfy the standards governing the grant of a new trial based on newly discovered evidence (see, *e.g.*, *United States* v. *Wynde*, 579 F. 2d 1088, 1097 (8th Cir. 1978); *United States* v. *Ellison*, 557 F. 2d 128, 133 n.2 (7th Cir.), cert. denied, 434 U.S. 965 (1977)), and the district court did not err in denying petitioner's motion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Where the information obtained by law enforcement officers is not exculpatory, the government is not obliged to make a complete and detailed accounting to the defense of all police investigatory work. *Moore* v. *Illinois*, 408 U.S. 786, 795 (1972).